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No. 85-924

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the absence of any prejudice to petitioner, he is entitled to a new trial on the ground that the actions of the district court gave rise to an appearance of impropriety, for purposes of 28 U.S.C. 455(b), where petitioner did not seek to recuse the district court judge until after trial and sentencing.

2. Whether the Due Process Clause requires that petitioner's convictions on bribery-related offenses be reversed on the ground that the government's conduct of its investigation of corruption in the local judicial system was improper.

3. Whether petitioner's convictions should be reversed on the ground that the government's introduction of hearsay evidence before the grand jury deprived him of his right to indictment by an unbiased grand jury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 768 F.2d 1518.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1985. A petition for rehearing was denied on September 27, 1985 (Pet. App. 36a). The petition for a writ of certiorari was filed on November 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to conduct and to participate in the affairs of an illegal enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d),

on seven counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and on 16 counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to concurrent terms of ten years' imprisonment on the RICO and Hobbs Act violations and five years' imprisonment on the mail fraud counts. Pet. App. 8a. The court of appeals affirmed (Pet. App. 1a-35a).

1. The evidence adduced at trial, the sufficiency of which is not in dispute, is fully described in the court of appeals' opinion. Pet. App. 2a-8a. It showed that petitioner, a judge of the Cook County courts from 1972 until 1984, took bribes in three categories of cases: traffic court cases in which petitioner was paid a bribe by defense counsel in order to obtain a favorable disposition; criminal cases in which defendants were represented by attorneys known as members of the "Hustlers Club," who paid petitioner for referring cases to them; and criminal cases fixed by petitioner in exchange for bribes. Some of the evidence that related to the last two categories was derived from an undercover investigation known as "Operation Greylord," an investigation of official corruption in the Cook County courts involving judges, lawyers, police officers, sheriffs, and clerks, and in which FBI agents posed as dishonest lawyers and litigants in staged cases.[1]

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[1]Several paragraphs of the description of the mail fraud scheme are based in part on Operation Greylord cases (Count 1, paragraphs 3(d), (e), (f), (g), (i), (k)). Counts 6 and 7 charged Hustlers Club type offenses involving Operation Greylord cases; petitioner was acquitted on Count 6. Six of the 13 overt acts charged in the RICO conspiracy count involved Operation Greylord (Count 18, paragraphs 3(8)-(13)); petitioner was acquitted of the substantive offenses charged as two of the overt acts. Six of the nine extortion counts charged involved Operation Greylord cases (Counts 22-27); petitioner was acquitted on two of those counts (Counts 22 and 23).

The traffic court cases involved petitioner's actions as a judge assigned to Cook County traffic court from 1972 to 1981. Judge Richard LeFevour, the Supervising Judge of the traffic court, was responsible for assigning judges to individual cases. His cousin, James LeFevour, a Chicago police officer assigned to police court, served as an intermediary between Judge LeFevour and the other participants in the scheme, including petitioner. The scheme operated as follows: Dishonest defense counsel who sought to ensure a favorable outcome for their clients would tell James LeFevour which major traffic cases were theirs, and James LeFevour would pass the information on to Judge LeFevour. In turn, Judge LeFevour would assign these cases to those judges, including petitioner, who were willing to "see" James LeFevour (Pet. App. 3a), and these judges would then be notified by James LeFevour which cases should be fixed. In the cases assigned to him, petitioner would enter not guilty verdicts, regardless of the evidence, or he would place the defendant on "supervision," a form of deferral favorable for defendants, since it allowed them to avoid a judgment of conviction. Defense counsel would then pay the LeFevours for their services. Although petitioner did not share in the proceeds of these payments, Judge LeFevour assigned petitioner to major traffic cases more often than other judges, thereby placing him in a position to receive his own bribes. Between 1975 and 1980, James LeFevour and a second police officer, Joseph Trunzo, accepted bribes for petitioner from lawyers known as "miracle workers" because they never lost drunk driving cases. *Id.* at 2a-3a.

In 1981, Judge LeFevour became Presiding Judge of the Cook County First Municipal District, a court of general jurisdiction, and he assigned petitioner to a branch of this court that handled non-jury misdemeanor cases. The "Wrestlers Club" charges against petitioner stemmed from

his actions during this period. Hustlers were lawyers who solicited business in corridors from persons who were about to enter a courtroom. The attorneys received their fee in these cases by persuading their clients to sign over to them the refund on the cash deposit necessary to post bail.[2] In many cases, the charges against a defendant would be dismissed because the arresting officer failed to appear or because the complaining witness decided not to prosecute. Although the defendant did not need a lawyer in those cases, because he would be discharged anyway, the Hustlers unethically solicited these cases, and judges such as petitioner allowed these lawyers to obtain the refund for their presence during summary dispositions. The lawyers who comprised the Hustlers Club paid the LeFevours $2500 on a regular basis for permitting them to solicit cases. For his cooperation in the scheme, petitioner was able to permit hustling by other lawyers. For instance, petitioner was paid by attorney Arthur Cirignani for each case in which petitioner allowed Cirignani to receive the bail refund. Pet. App. 5a-6a.

Petitioner also accepted bribes in exchange for fixing a number of criminal cases. For example, in one case he received $300 for agreeing to suppress evidence.[3] Evidence of six other cases fixed by petitioner in exchange for bribes was also presented at trial. These cases were part of Operation Greylord. FBI agent Terrence Hake or David Ries appeared as a dishonest defense attorney representing an

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[2]Under Illinois law, a defendant required to post bail may deposit 10% of the bond amount in cash. When the defendant is discharged, the clerk will refund the cash deposit to him. The payment, known as a cash bond refund (CBR), can also be paid to defense counsel with the consent of his client and the court. Pet. App. 4a.

[3]The Illinois Court of Appeals reversed the suppression order. *People* v. *Best*, 97 Ill. App. 3d 1083, 424 N.E.2d 29 (1st Dist. 1981); see Pet. App. 6a.

FBI agent acting undercover as a criminal defendant charged with a crime and scheduled to be tried in petitioner's court; the complaining witness in each case also was an FBI agent acting undercover. In these cases, after petitioner found the "defendant" not guilty or terminated his supervision, an FBI agent, posing as defense counsel, paid James LeFevour or another police officer $200 or $300 to be delivered to petitioner and an additional sum for the officer. Pet. App. 6a-8a.

2. Petitioner was tried before United States District Judge Charles Kocoras, and he was sentenced on August 8, 1984. Nearly six months later, on February 7, 1985, petitioner filed a motion seeking the recusal of Judge Kocoras and a new trial. Petitioner's motion was supported by his own affidavit and that of two of his three trial counsel. In the motion, petitioner alleged that "newly discovered information" became available on or about August 17, 1984, that the United States Attorney, Dan Webb, who had served as the principal trial attorney for the government in this case, Judge Kocoras, and their families had vacationed together at the Calloway Gardens Resort in Pine Mountain, Georgia, shortly after petitioner had been sentenced. Petitioner's motion also alleged that the U.S. Attorney and Judge Kocoras were "close, personal friends," and that, if he had known that, he would have asked the judge to recuse himself and declare a mistrial (Pet. App. 24a-25a; Motion 2; Murphy Affidavit 4-5). Relying on 28 U.S.C. 455(a) and Fed. R. Crim. P. 33, petitioner argued that his due process and equal protection rights were abridged and that he was entitled to a new trial because Judge Kocoras' impartiality might reasonably be questioned.[4] Petitioner did not claim

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[4]28 U.S.C. 455(a) provides that:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

that Judge Kocoras harbored any actual bias or prejudice towards him.

The record reveals that in November 1983, before petitioner was indicted, Webb and Judge Kocoras reserved adjoining cottages at Calloway Gardens for themselves and their families for mid-August 1984 (Murphy Affidavit 4). On December 14, 1983, petitioner was first indicted and the case was assigned by lot to Judge Kocoras. The case was initially scheduled to be tried by an Assistant United States Attorney, but on May 29, 1984, Webb became lead prosecutor. *Id.* at 1-2; see U.S. C.A. Br. 71. The jury's verdict was returned on June 14. Sentencing was originally scheduled for August 31, but it was later advanced to August 8 so that the case could be completed before Judge Kocoras left on vacation. Thereafter, Webb and Kocoras took their vacations. Pet. App. 24a-25a.

At a hearing on petitioner's motion, Judge Kocoras made the following findings, which petitioner has not challenged: Judge Kocoras and petitioner's chief trial attorney, Matthias Lydon, attended law school together, where they were enrolled in a number of the same classes (3/1/85 Tr. 3-4). Judge Kocoras first met Dan Webb in 1971 when they became Assistant United States Attorneys in the Chicago office, where Lydon was already working as an attorney (*ibid.*). There, Judge Kocoras, Webb, and Lydon developed close professional and personal relationships (*ibid.*). Petitioner had been advised by Lydon before trial that the three men had been Assistant United States Attorneys in the same office, that Lydon and Webb had been law partners before Webb became the United States Attorney, and that the three men "were still friends" (*id.* at 5). Judge Kocoras also found that petitioner had acknowledged that he was

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Petitioner does not raise any claim under 28 U.S.C. 455(b) in the petition.

aware of this friendship in the presence of the probation officer who prepared his pre-sentence report (*id.* at 5). Judge Kocoras stated that "[w]hether Judge Murphy was pleased with those friendships or whether he thought they would benefit him, I cannot say. The record in this case is abundantly clear, however, that he was not disquieted by them" (*ibid.*). Finally, Judge Kocoras noted that the families of several persons who had served the federal government in the Chicago area had vacationed at Calloway Gardens for years, and that Lydon, Webb, and he had once vacationed there together with their families (*id.* at 4).

Following the hearing, Judge Kocoras denied petitioner's motion (3/1/85 Tr. 6). Rather than decide whether the motion was untimely under Fed. R. Crim. P. 33 or should be treated as a motion for a new trial based on newly discovered evidence, Judge Kocoras denied petitioner's motion on the merits (3/1/85 Tr. 6). He explained that petitioner had been convicted by an impartial jury on the basis of the evidence presented at trial and that he had imposed petitioner's sentence on the same basis (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1a-35a). The court found that, although there was no doubt that Judge Kocoras had in fact been impartial, the judge's vacation plans gave rise to an appearance of partiality, because "an objective observer reasonably would doubt the ability of a judge to act with utter disinterest and aloofness when he was such a close friend of the prosecutor that the families of both were just about to take a joint vacation" (*id.* at 27a-28a). However, the court found that the fact that petitioner's chief trial counsel was also a close friend of Judge Kocoras and had vacationed with him "removes some of the sting from the revelation about the vacation plans of the judge and the prosecutor" (*id.* at 29a). While the court declined to rule that petitioner had waived his disqualification claim by failing to raise it until after trial (*ibid.*), it held

that the nullification of an already-completed trial was not an appropriate remedy in this case because 18 U.S.C. 455(a) contemplates only prospective disqualification due to an appearance of bias (*id.* at 30a).

As the court explained, Section 455(e) allows the defendant to waive disqualification because of an appearance of bias but not because of actual bias. That difference, the court reasoned, demonstrates that an appearance of impropriety does not undercut personal rights and injures only the system as a whole (Pet. App. 31a). Therefore, given the substantial costs to the system from overturning an otherwise valid conviction, an appearance of bias is not a proper basis for reversing a conviction where the claim is raised for the first time after trial (*ibid.*). That result, the court noted, was supported by the fact that petitioner could have filed a pre-trial recusal motion, since he was aware of the friendship that Judge Kocoras, Webb, and Lydon shared, but chose not to raise this claim (*id.* at 32a).

In a concurring opinion, Judge Swygert stated that, given the close relationship between defense counsel and Judge Kocoras, the evidence offered in support of the motion was not newly discovered evidence under Fed. R. Crim. P. 33, that petitioner could have learned the facts surrounding the relationship between the judge and prosecutor with the exercise of due diligence, and that the failure to exercise due diligence constituted a waiver of the right to consideration of the merits of his recusal motion. Pet. App. 34a-35a.

The court of appeals also rejected petitioner's challenges to Operation Greylord, finding that the FBI agents played their roles in the manufactured cases without criminal intent, and that "Operation Greylord harmed only the corrupt" (Pet. App. 11a).

ARGUMENT

1. The court of appeals held that 28 U.S.C. 455(a) does not require an appellate court to set aside a judgment where a motion for recusal is not filed until after trial and the basis for the claim is not the presence of actual bias but that the judge's actions gave rise to an appearance of partiality.[5] Petitioner claims (Pet. 13-21) that the court's decision is inconsistent with the text of 28 U.S.C. 455(a) and conflicts with rulings from other circuits. For several reasons, however, petitioner's claim does not warrant review by this Court.

First, the unusual facts giving rise to petitioner's claim are not likely to recur with the frequency necessary to justify review by this Court. Petitioner does not argue that the personal friendship among Judge Kocoras, the U.S. Attorney, and petitioner's principal trial counsel by itself provides a sufficient ground for disqualifying Judge Kocoras under Section 455(a). As the court of appeals observed (Pet. App. 26a-27a), such relationships are neither unusual nor disfavored. It would be unrealistic to require trial judges to abandon friendships developed before they were elevated to the bench or to enjoin them from acquiring new ones with counsel who appear in their court. The day-to-day management of the judicial process demands that district court judges be able to maintain a professional relationship with the members of the bar in order to ensure the efficient administration of the various aspects of the criminal process, such as the conduct of grand jury proceedings. That some of these relationships may also be ones of friendship should not materially affect a judge's ability to remain

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[5]In *United States* v. *Balistrieri*, No. 84-2001 (7th Cir. Nov. 12, 1985), slip op. 21, the court held that mandamus provides the sole remedy for a district court's denial of a disqualification motion under Section 455(a). That issue is not presented in this case, however.

disinterested and unbiased. The court of appeals was therefore correct in refusing to treat the well-known relationship among the three chief trial participants by itself as a ground for imputing bias to Judge Kocoras. It was only the coincidental timing of Judge Kocoras' and the U.S. Attorney's joint vacation plans that gave the court of appeals pause, and that fortuity is unlikely to recur.

Second, as Judge Swygert explained in his concurring opinion (Pet. App. 34a-35a), unless petitioner's recusal motion, which was filed nearly six months after sentencing, is treated as a motion for a new trial on the basis of newly discovered evidence, that motion is untimely under Fed. R. Crim. P. 33 and cannot provide a basis for relief, because the period established by that rule is jurisdictional. Fed. R. Crim. P. 45(b); *United States* v. *Smith*, 331 U.S. 469 (1947); 3 C. Wright, *Federal Practice and Procedure* § 558, at 360-361 (1982). However, petitioner has failed to meet the test for obtaining a new trial on the basis of newly discovered evidence. He does not suggest that Judge Kocoras was actually biased or that Section 455(a) imposes a jurisdictional limitation upon a trial court's authority to conduct a trial, and there can be no serious claim that the information concerning Judge Kocoras' and the United States Attorney's joint vacation plans would probably have led to his acquittal at trial. See *United States* v. *Agurs*, 427 U.S. 97, 111 (1976); 3 C. Wright, *supra*, § 557, at 315. Accordingly, petitioner has failed to state a claim for relief under Rule 33.

In any event, the court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Section 455(a) itself is silent on the issue of the appropriate remedy where a disqualification motion is not filed until after trial, and petitioner has offered no sound reason why his trial should be nullified at this point in the absence of prejudice. As the court of

appeals explained (Pet. App. 30a-32a), retroactively upsetting a judgment on the ground that the trial judge's actions gave rise to an appearance of impropriety is unnecessary to safeguard any personal rights of the losing party and needlessly penalizes both a successful party and the system as a whole. Accord *Home Placement Service, Inc.* v. *Providence Journal Co.*, 739 F.2d 671, 677, 679 (1st Cir. 1984), cert. denied, No. 84-844 (Jan. 21, 1985) (refusing to invalidate damages portion of trial where a recusal motion was filed afterwards; reversing judgment only as to award of attorneys' fees, which followed the filing of the motion). In fact, ordering a new trial would be particularly inappropriate in this case, given petitioner's knowledge of the longstanding and open friendship between Judge Kocoras and the U.S. Attorney. Cf. *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1115 (5th Cir.), cert. denied, 449 U.S. 820 (1980) ("a litigant should not be permitted to utilize a disqualification issue as part of his trial strategy"); see also *Barry* v. *United States*, 528 F.2d 1094, 1100 (7th Cir.), cert. denied, 429 U.S. 826 (1976) (any error in judge's failure to recuse himself was harmless where defendant did not question fairness of trial).

The court of appeals' decision also does not "nullif[y] the plain language of Section 455(a)," as petitioner suggests (Pet. 16). Under 28 U.S.C. 144, once an affidavit is filed alleging that a judge is actually biased, the judge must cease acting in the case, but the filing of the affidavit does not nullify previous actions taken by the judge. See *Marty's Floor Covering Co.* v. *GAF Corp.*, 604 F.2d 266, 268 (4th Cir. 1979), cert. denied, 444 U.S. 1017 (1980) (disqualification under 28 U.S.C. 144 is prospective only; denying motion for a new trial); cf. *Berger* v. *United States*, 255 U.S. 22, 31-32, 35 (1921) (citing with approval *Ex Parte Glasgow*, 195 F. 780 (N.D. Ga. 1912), which held that the predecessor to 28 U.S.C. 144 did not provide a remedy after the completion of trial). It would thus make little sense to

nullify an entire trial when only a charge of an appearance of impropriety is made.[6]

Petitioner errs in claiming (Pet. 13-16) that the court of appeals' decision in this case conflicts with rulings from other circuits construing 28 U.S.C. 455(a). Only one decision cited by petitioner (Pet. 15) reversed a judgment under Section 455(a) where the claim was not raised until after trial, *Hall* v. *SBA*, 695 F.2d 175 (5th Cir. 1983),[7] and, as the court of appeals noted (Pet. App. 30a n.3), *Hall* is best viewed as an example of actual bias imputed to the court. There, a magistrate's law clerk had resigned from the defendant agency after complaining of gender discrimination, but assisted the magistrate in deciding a gender discrimination class action suit, in which she was once a member of the plaintiff class, brought against her former employer. When this fact was brought to his attention before trial, the magistrate declined to recuse himself or to disqualify his law clerk, and he allowed his clerk to assist him draft his opinion in the case, which she continued to do

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[6] In other settings as well, this Court has refused to adopt a per se rule requiring a conviction to be reversed because of a statutory violation. See *Rosenberg* v. *United States*, 360 U.S. 367, 370-371 (1959) (violation of the Jencks Act, 18 U.S.C. 3500); see also *Rogers* v. *United States*, 422 U.S. 35, 40 (1975) (violation of Fed. R. Crim. P. 43); cf. *United States* v. *Donovan*, 429 U.S. 413 (1977) (violation of federal wiretap laws does not automatically require suppression).

[7] *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1115 (5th Cir.), cert. denied, 449 U.S. 820 (1980), expressly reserved this issue; the court vacated the judgment because of a violation of Section 455(b), which is not at issue here. In both *Roberts* v. *Bailar*, 625 F.2d 125, 127 (6th Cir. 1980), and *Fredonia Broadcasting Corp.* v. *RCA Corporation*, 569 F.2d 251, 254 (5th Cir. 1978), cert. denied, 439 U.S. 859 (1978), a pretrial disqualification motion was filed. *United States* v. *Ritter*, 540 F.2d 459 (10th Cir. 1976), was a pretrial mandamus proceeding. The remaining court of appeals decisions cited by petitioner either found no violation (or a waiver) of Section 455(a) or were concerned with Section 455(b).

after accepting a job offer from the plaintiffs' law firm. The court of appeals found that the magistrate erred in part in "failing voluntarily to disqualify himself or to insulate himself from his clerk on the facts known to him before he rendered judgment" (695 F.2d at 180). *Hall* was therefore not merely a case in which the judge's impartiality might be questioned.

2. Petitioner contends (Pet. 21-23) that the government's conduct of Operation Greylord was so outrageous that the Due Process Clause requires that his convictions be set aside.[8] He argues that the government's conduct amounted to a fraud on the courts that is offensive to principles of fundamental fairness. However, as the court of appeals recognized (Pet. App. 9a), the conduct of the government's investigation in Operation Greylord is not materially different from the type of undercover operation that the government carried out in the Abscam investigation. There, the courts of appeals uniformly rejected the contention that the government's conduct violated the Due Process Clause, and this Court consistently denied review. See, *e.g.*, *United States* v. *Jenrette*, 744 F.2d 817 (D.C. Cir. 1984), cert. denied, No. 84-1171 (May 13, 1985); *United States* v. *Jannotti*, 729 F.2d 213 (3d Cir. 1984), cert. denied, No. 83-1891 (Oct. 9, 1984); *United States* v. *Silvestri*, 719 F.2d 577, 581 (2d Cir. 1983); *United States* v. *Weisz*, 718 F.2d 413, 440-441 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984); *United States* v. *Kelly*, 707 F.2d 1460 (D.C. Cir.), cert. denied, 464 U.S. 908 (1983); *United States* v. *Williams*, 705 F.2d 603 (2d Cir.), cert. denied, 464 U.S. 1007 (1983);

[8]Only five of the 24 counts on which petitioner was convicted were based solely on Operation Greylord cases, and the sentences he received for those counts are in each instance concurrent with the sentences he received in actual cases.

United States v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). Petitioner's claim is equally insubstantial.[9]

As the court of appeals correctly noted (Pet. App. 9a-11a), the government's use of undercover officers is essential to the investigation of certain crimes, such as bribery. See *Maryland* v. *Macon*, No. 84-778 (June 17, 1985), slip op. 6; *Lewis* v. *United States*, 385 U.S. 206, 210 n.6 (1966). While it is true that the undercover agents conceived and executed important aspects of the scheme to uncover bribery in the local judicial process, and that the crimes charged against petitioner would not have occurred in this manner if the government had not been so involved, that is also routinely true of undercover operations and has never been thought sufficient to bar a prosecution of a willing participant. It is well settled that the government does not violate the Due Process Clause merely by providing a predisposed defendant with the means and the opportunity to commit a crime. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrels* v. *United States*, 287 U.S. 435, 441 (1932). That is all the agents did here; by acting as participants in the judicial process, the agents here simply reproduced circumstances likely to arise and recur in the Cook County courts and provided judges like petitioner who were willing to be corrupted with an opportunity to reveal their true colors. As the court of appeals put it, "[t]he Government offered Murphy opportunities to sell the powers of his office and disgrace himself. He accepted with alacrity." Pet. App. 10a (footnote omitted).

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[9]Moreover, the Speech or Debate Clause and separation of powers claims advanced in the Abscam cases have no counterpart here.

Petitioner does not contend that undercover operations are generally forbidden; rather, his argument hinges upon the claim that the agents' participation in cases that were artificially created for the purpose of discovering corrupt judges constitutes a misuse of the judicial process to bring about a conviction. However, petitioner has failed to offer a principled distinction between the type of investigation that was carried out here and that performed in other circumstances where bribery or extortion is the focus of inquiry.

The purpose of Operation Greylord was to investigate allegations of corruption in the Cook County judicial system. The government's need to use undercover agents in a manner that made them appear to be actual parties in the judicial process was therefore obvious and indisputable. Just as an agent must often take part in the actual sale of narcotics to identify persons who traffic in contraband, so too an agent must engage in acts of bribery to investigate official corruption. Because "[c]ases are the daily work of courts" (Pet. App. 10a), if corruption takes place in the judicial process, agents must necessarily provide judges with "an opportunity suitable to their calling" (*ibid.*). The undercover agents' participation in the "cases" put together for the purpose of their investigation was therefore entirely appropriate; indeed, given the nature of the investigation, the agents could scarcely have done otherwise. Accordingly, unless the Due Process Clause imposes standards for the investigation of dishonest judges that differ from those applied in other investigations of corrupt government officials, the fact that Operation Greylord required undercover agents to become involved in the judicial process does not provide a basis for treating this case in a unique fashion.

Nor does it matter that the agents gave fabricated testimony in the cases in dispute. The "perjury" committed in these cases is no more offensive to due process than the "sale" of narcotics in *Lewis*. In each case, as the court of

appeals recognized (Pet. App. 10a), the agents' conduct is an indispensible element of an undercover operation and does not constitute a crime because the element of scienter is absent. In addition, given the fact that state and local officials were notified of the investigation (*id.* at 11a), there can be no claim that the Greylord investigation offended the local judicial process (assuming that petitioner has standing to assert any such claim).

Petitioner erroneously asserts (Pet. 22-23) that the court of appeals' decision conflicts with *United States* v. *Archer* (*Archer I*), 486 F.2d 670 (2d Cir. 1973). There, the court reversed the defendants' convictions on the ground that the federal agents had deliberately fabricated federal jurisdiction by making and causing the defendants to make long-distance telephone calls that served no purpose other than to provide the jurisdictional basis for converting a state offense into a federal crime. Here, by contrast, "[t]he prosecutors did not move a state crime to a federal court by main force" (Pet. App. 9a). Petitioner's claim is thus materially different from the claim upon which the court reversed the convictions in *Archer I*; his claim is that the government unlawfully "manufactured" the crime (Pet. App. 9a). As explained above, that claim warants no further review.

In this regard, petitioner relies (Pet. 22-23) on dicta in *Archer I* criticizing the conduct involved in the investigation in that case. See 486 F.2d at 674-677. However, *Archer I* expressly reserved the question whether that conduct was so offensive that the defendants' convictions must be set aside (*id.* at 677), and in *Archer* v. *Commissioner of Correction* (*Archer II*), 646 F.2d 44, 46-47 (2d Cir.), cert. denied, 454 U.S. 851 (1981), a state prosecution stemming from the same investigation, the court held that the conduct criticized in *Archer I* was not so outrageous as to violate the Due Process Clause. Moreover, since *Archer I* was decided,

the Second Circuit has never ruled that the Due Process Clause forbids the criminal prosecution of a willing participant. See, e.g., *United States* v. *Carpentier*, 689 F.2d 21, 26-27 (2d Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Alexandro*, 675 F.2d 34, 39-41 (2d Cir.), cert. denied, 459 U.S. 835 (1982).

3. Finally, petitioner apparently contends (Pet. 23-24) that the prosecutor's use of the hearsay statements of James LeFevour before the grand jury deprived him of the right to an indictment by a fair and unbiased grand jury. The court of appeals correctly rejected this insubstantial claim (Pet. App. 18a-20a), which, petitioner concedes, entails no conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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